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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 784

ARNOLD GEORGE SANDBANK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 48-50) is not yet reported. The opinion of the district court (Pet. App. 32-47; Tr. 195-216),[1] is not yet reported.

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[1] "Tr." designates the trial transcript on file with the Clerk of this Court. We are also filing herewith petitioner's selective service file, which was received in evidence at the trial (Govt. Ex. 1-137; Tr. 16-18).

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1968 (Pet. App. 51). The petition for a writ of certiorari was filed on November 29, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the petitioner was continuously subject to a valid order to report for induction.
2. Whether in the circumstances of this case, the local board properly refused to reopen petitioner's selective service classification.
3. Whether the government proved that the registrant was called in proper order.

STATEMENT

Petitioner was indicted on three counts in the Southern District of New York for his alleged failures to report for induction into the armed forces on October 26, 1966, and July 26, 1967, and his alleged failure to submit to induction on January 3, 1968, all in violation of 50 U.S.C. App. 462(a) (Tr. 3-4). After waiving his right to a jury (Tr. 7-8), he was tried and convicted of failure to report on July 26, 1967, and failure to submit on January 3, 1968; he was acquitted of failure to report on October 26, 1966 (Tr. 195; Pet. App. 32). On June 5, 1968, petitioner was sentenced to concurrent three year terms of imprisonment on the two counts (Tr. 230). The court of appeals affirmed the conviction in open court (Pet. App. 48).

Petitioner (then eighteen years of age) registered with local board No. 23, Bronx, New York, on December 3, 1963 (Tr. 19; G. Ex. 1-A). A few days later, he affirmatively stated in his classification questionnaire that he was making no claim for deferment as a conscientious objector (G. Ex. 2, p. 4; see Pet. App. 33). On June 2, 1965, he was classified 1-A and, on the following day, a notice advising him of this classification and of his right to appeal was mailed to him (Tr. 20-21, see also Tr. 23).

Petitioner's first physical examination, in October, 1965, resulted in his reclassification as 1-Y (not presently fit for military service subject to future reexamination) because of a hyperthyroiditis condition (Tr. 21). A second examination led to his reclassification as 1-A in June 1966. Petitioner had sought to appeal this classification prematurely, when informally notified of it in May; as a result, the medical evidence was again evaluated; in September, 1966, petitioner was formally retained in his 1-A classification and notified of this determination (Tr. 21-24). Petitioner did not seek to appeal the September or June classifications within the Selective Service System (Tr. 21-31), and on October 13, 1966, the local board mailed petitioner an order to report for induction on October 26, 1966 (G. Ex. 59; Tr. 31-32).

At some subsequent time, but before October 26, 1966, petitioner's mother complained to a Congressman and the Surgeon General that petitioner was going to be inducted despite his history of hyperthyroidism. After receiving a telegram from the Congressman stating that her son would not be inducted

on the 26th but "must report for physical examination * * * as scheduled" (D. Ex. A; Tr. 122-123), she telephoned the induction center early on the morning of the 26th and stated that her son would not report, as his induction had been cancelled (see Tr. 87, 136-141, 114-119, 121-123, 152-154). Petitioner failed to appear at the induction center on that day (Tr. 32-33).

The handwritten notation "canc" appeared next to petitioner's name on one copy of the "delivery list" sent by the local board to the induction station to indicate which registrants were to report for induction on October 26 (Tr. 45, G. Ex. 139, Pet. App. 31). The clerk of another local board in New York City, who testified as an expert on local board procedure (Tr. 52-53), stated that such a notation would not be made by the local board (Tr. 46, 49). Godofredo LeBron, the employee of the induction center who handled the October 26 delivery list, testified that all other notations on the list were in his handwriting but that this particular notation was not (Tr. 69-70, 74-75). He stated that he did not know who had made this entry; that he always received an instruction from the local board before he recorded an entry that an induction was cancelled; that he had not received any such instruction in this case; and that he had no authority to cancel petitioner's induction on his own (Tr. 64, 69-70, 79, 82-84). The other copies of the list do not have the "canc" mark, but bear Mr. LeBron's notation that petitioner had failed to report (G. Exs. 140-141; Tr. 65, 71). Mr. LeBron gave the list to an Army officer at the center (Tr. 81). That officer did not know how the notation "canc" was entered, although any of sev-

eral persons at the center could have written it in (Tr. 98-100). Mr. LeBron also testified that he was advised on the afternoon of October 26 by military personnel at the induction center that petitioner was not to be inducted that day but was to be referred for a complete medical processing (G. Exs. 85-88, 142; Tr. 67-68).

In accordance with a determination made by the Surgeon General's office (Tr. 115-116, 121-123), arrangements were made for petitioner to take a full medical examination at St. Albans Naval hospital on November 21, 1966 (G. Ex. 87; Tr. 68, 90-91, 155-156). Meanwhile, the local board advised petitioner by a letter of November 15 that the October 26 order to report for induction remained in full force and effect, and that he should report for induction on November 23, 1966 (G. Ex. 51). Petitioner completed all but one of the tests at St. Albans on November 21, and was scheduled to return on November 28 (G. Ex. 87; Pet. App. 36-37). He reported for induction on November 23, but was held over, since the tests had not been completed nor his medical acceptability determined (G. Exs. 42, 136; Tr. 109-112, 158).

On November 25, petitioner wrote to his local board. He characterized himself as a "medical holdover," advised that he now considered himself a "C.O.," and requested a conscientious objector form (G. Ex. 42; Pet. App. 37). Petitioner did not appear at St. Albans for his final test on November 28 (G. Ex. 84). Form 150, the conscientious objector form, was mailed to petitioner December 9 (Tr. 33-34, 57); on December 19, it was returned completed to the Board and on the

same day petitioner reported for his final thyroid test at St. Albans (G. Exs. 94-95, Tr. 34, 57-58; Pet. App. 37-38).[2] In the form, petitioner claimed exemption from both combatant and non-combatant training (Tr. 34, 57-58; Pet. App. 37-38), and stated, *inter alia*, that he believed in a "Supreme Being" and that his belief was "in the brotherhood of all man and which takes in a respect for all life" (G. Ex. 37; Pet. App. 38).

On January 3, 1967, petitioner requested an appearance before the local board in connection with this claim. The board consulted the Selective Service's legal division, which advised it to grant petitioner an interview but to "remind him that he is still under an induction order having been found fully acceptable by the Armed Forces and the only purpose of the meeting will be to discuss his request for I-O" (G. Ex. 32); it further advised that the board could reclassify petitioner only if it found a change of status resulting from circumstances beyond his control, in view of the outstanding induction order, but that if the board found him to be sincere it could recommend that the New York City Director of Selective Service reopen the case under 32 C.F.R. 1625.3 (*ibid.*). Petitioner was then granted an "interview," which was set for April 11 (G. Ex. 29).

The board's minutes of the interview (G. Ex. 30; Tr. 34-35) indicate that petitioner was "conscientiously opposed to taking a life." This attitude was "not

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[2] The tests revealed that petitioner was fit for induction, as he was formally notified on January 17, 1967 (G. Exs. 33, 70).

connected with any religious belief"; petitioner "felt [this attitude] in [the] last year." The board then explained 1-AO classification (military service as a non-combatant), and petitioner said he would go to national headquarters the next day and change his request to encompass this classification. The board indicated that it would "go along (Vote 5 to 1)" (*ibid.*). On April 17, however, the board received a letter in which petitioner said that he had learned that if classified 1-AO he would probably have "to engage in activities of military nature * * * directly assisting the military effort. This," he said, "runs completely counter to my religious and philosophical training since childhood, in both my church and home * * *, and my conscience refuses to accept this classification. * * * I would not object to participate in work of a completely nonmilitary nature" (G. Ex. 28; Tr. 36-38).

The local board then invited petitioner for a second interview, which was ultimately held on June 27, 1967 (G. Exs. 22-24, 26). According to the board's notes, he stated that religious training or belief was not "the primary * * * or a really important factor" in his opposition to "violence in any form,"[3] and that "[h]e felt this way for a long time before he got his Induction Notice [but] * * * did not bring it up because he thought or hoped it would not be necessary." The board concluded that "he is sincere, but also finds that his beliefs are primarily based upon his philosophy of morality and somewhat on the political philosophy of

[3] Petitioner reaffirmed this statement at his trial (Tr. 120; 169-170).

his family * * * [and thus that] he does not meet the legal requirements for a 1-O classification. * * * In any event the registrant had these convictions long before he received his notice of induction and he so states. There have arisen no circumstances beyond his control which would impel the Board to recommend cancellation of his induction" (G. Exs. 22-23; Tr. 39-40).

On June 29, 1967, the local board notified petitioner by letter that his classification would not be reopened and that he remained subject to continued processing (G. Ex. 21; Tr. 162). He promptly sought to appeal what he characterized as a "decision classifying me as 1A" (G. Ex. 20). He was then advised that his appeal was not timely (see G. Exs. 12, 15, 19), and was ordered to report for induction on July 26, 1967 (G. Ex. 17).[4] He failed to report as ordered. On January 3, 1968, he reported to the induction center, where he was given a physical examination. There was no evidence of any thyroid condition and he was found acceptable. He then refused to submit to induction (G. Exs. 76, 133; Tr. 43-44, 47, 94-96).

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[4] The local board clerk who testified as an expert on Selective Service practice stated that this order did not cancel the October 1966 order. She stated "It can be postponed; it can be rescheduled, but that first order applies" (Tr. 41). In response to the trial court's inquiry as to the effect of the July 1967 order to report, government trial counsel stated that this order was sent to make sure that petitioner knew of his continuing duty to report, in light of the delay occasioned by the examination into his physical condition and objector claim. It was sent "in furtherance of that first order" and "did not have the effect legally or factually of cancelling the first order" (Tr. 42-43).

ARGUMENT

Since the effect on a registrant's classification of a local board's examination of claims for exemption made after the mailing of an induction notice is among the questions presented by this case, this Court may wish to defer consideration of this petition pending its consideration and decision in *DuVernay* v. *United States*, No. 814, this Term, certiorari granted, December 9, 1968, in which this question was also raised. The government believes, however, that the courts below correctly held that the the local board was not required to reopen and did not reopen petitioner's classification.

1. Unless, as petitioner argues, the October 26 order to report for induction was no longer in force when his conscientious objection claims were presented to the local board, it is clear that he was not entitled to reopening of his classification. Selective Service Regulations provide in pertinent part, 32 C.F.R. 1625.2, that the "classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction * * * unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant has no control." The courts of appeal have unanimously held that this rule is a valid and reasonable means of preventing disruption of the administration of the Selective Service System by the belated assertion of pre-existing claims, and is not in derogation of the statutory exemption of conscientious objectors (50 U.S.C. App. 456(j)). See *e.g.*, *Davis* v. *United States*, 374 F. 2d 1, 4 (C.A. 5);

United States v. *Al-Majied Muhammad*, 364 F. 2d 223 (C.A. 4); *United States* v. *Taylor*, 351 F. 2d 228, 230 (C.A. 6); *United States* v. *Beaver*, 309 F. 2d 273, 276 (C.A. 4), certiorari denied, 371 U.S. 951; *Keene* v. *United States*, 266 F. 2d 378, 383-384 (C.A. 10); *United States* v. *Geary*, 368 F. 2d 144, 149 (C.A. 2). As the board found and petitioner conceded in his letter rejecting the possibility of 1-AO classification, the asserted grounds of petitioner's conscientious objector claim were in existence long before he was sent the October 26, 1966 notice to report for induction. There is thus no assertion that petitioner's conscientious objection did not "crystallize" or "mature" until after he had received his induction notice, in contrast to cases discussed in our brief in opposition filed in *Hoapili* v. *United States*, No. 663 Misc., this Term; thus, if the October 26 order to report was still outstanding, reopening of the classification was properly denied.

So far as the October 26 order's continuing validity presents a question of fact, it plainly does not warrant this Court's review. Both courts below found sufficient evidence to conclude that the order was merely postponed, rather than cancelled, when the Surgeon General agreed to delay petitioner's actual induction in order to examine further petitioner's medical claims (Pet. App. 40, 41, 49). The local board acted at all times in a manner consistent with the view that the order to report was postponed, not cancelled—as when it termed its meetings with petitioner "interviews" rather than "appearances in person," which are permitted only within 30 days of a notice of classification,

32 C.F.R. 1624.1(a). In corresponding with each other after October 26, the local board and petitioner indicated their understanding that the order was still outstanding (G. Exs. 42, 43, 51).[5]

There is no basis for concluding that the order was cancelled or had lapsed as a matter of law. The actions of military authorities— such as the Surgeon General, or personnel at an induction station—in delaying or postponing the induction of a registrant have no legal impact on the validity of induction orders issued by the local board. It is only the local board itself which can issue or cancel orders to report for induction,[6] and it did not do so. Similarly, Section 1632.2(a) of the Selective Service Regulations, 32 C.F.R. 1632.2(a), did not have the effect, urged for the first time by petitioner in this Court, of automatically cancelling the order to report once 120 days had elapsed after October 26. Although that regulation does limit the period during which a local board may grant postponement to

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[5] This was also the view of National Selective Service Headquarters in its February 14, 1967 communication with the local board concerning this case (G. Ex. 32).

[6] Thus, the governing statute provides that the civilian operated local board shall carry out the function of "registration, examination, classification, selection, assignment, [and] delivery for induction" of registrants. 50 U.S.C. App. 460 (b)(3) (Supp. III). The Selective Service regulations provide for cancellation of an outstanding order to report for induction where the local board reopens a classification (32 C.F.R. 1625.14). The local board may do so of its own accord in the circumstances set forth in 32 C.F.R. 1625.2; see also 32 C.F.R. 1625.3(b). It must so do where such action is requested by the State Director of Selective Service or the Director of Selective Service (32 C.F.R. 1625.3(a)).

120 days, it authorizes the Director of Selective Service to "postpone the induction of a registrant until such time as he may deem advisable." Within 120 days, the local board had contacted National Headquarters and had been advised to grant petitioner the interview he requested but to treat him as continuing to be under the October 26 order to report. Thus, if the delay in petitioner's case was a Section 1632.2 "postponement," it does not follow that petitioner's induction was not validly postponed for the full duration. At all events, it would appear that 32 C.F.R. 1632.2(a) is simply a method of prohibiting local boards from showing favoritism to particular registrants by granting them continuous postponement of their induction. Non-compliance by a local board with this internal mechanism of assuring even-handed administration of the Selective Service System should not be the basis for a claim of error by a registrant—particularly by one who benefited from the delay. The delay not only afforded petitioner several additional months free from his military obligations, but afforded him the opportunity to have his untimely claim to 1-O status considered by his local board—a claim which on no different evidence he had affirmatively disclaimed some three years before (see G. Ex. 2, p. 4). Finally, 32 C.F.R. 1632.2(d) affirmatively states that a "postponement of induction shall not render invalid the Order to Report for Induction * * * but shall operate only to postpone the reporting date * * *."[7]

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[7] While Section 1632.2(d) goes on to say "and the registrant shall report on the new date without having issued to him a new Order to Report for Induction", that Section is not

2. The local board's consideration of petitioner's claim did not constitute a reopening-in-fact of his classification, from which he would have been entitled to appeal. The local board simply examined petitioner's claim to determine if he qualified for reopening under the standard set by 32 C.F.R. 1625.2, and determined that he did not. The local board's indication after the April 27 meeting that it would "go along" with a 1-AO classification if Selective Service Headquarters directed was merely a recognition that there was no factual basis on which the Board itself could act.

Indeed, on this record the same finding would have been required even if petitioner had not been subject to a valid order to report for Induction. Where a claim for exemption is made *before* a notice of induction is mailed, Section 1625.2 states that the local board may reopen a registrant's classification if the claim states facts "which, if true, would justify a change * * *". But, as shown in the Statement above, petitioner repeatedly stated that his opposition to war and taking life was not importantly related to any religious belief. Compare *United States* v. *Seeger*, 380 U.S. 163, 184-185. Thus, he failed to demonstrate

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rendered inapplicable to this case because petitioner was mailed another order to report in July, 1967. The only trial evidence introduced as to the effect of the July order was the testimony of the government's witness on local board procedure that the "first order [still] applies" (Tr. 41). Cf. *Keene* v. *United States*, 266 F. 2d 378, 384 (C.A. 10). Moreover, even if the July 26, 1967 order was a new order which technically cancelled the October 26 order, it was mailed on July 11, 1967, two weeks after the local board had refused to reopen (G. Ex. 22) at a time when the October 1966 order was still in force.

a basis for reopening his classification even under the pre-induction standard.

3. Petitioner asserts that the government must prove in its case-in-chief that the person refusing induction was called in proper order. The court of appeals ruled that, as in the case of the insanity defense, the question must be put in issue by the defense. This ruling is clearly correct and is in agreement with similar rulings in the Fifth Circuit. See *Pigue* v. *United States*, 389 F. 2d 765 (C.A. 5) and cases there cited. There is no conflict among the circuits. Indeed, as the court below itself noted, the ruling was not required by the case, since the record adequately supports the finding made by the trial judge that petitioner *was* called in proper order (Pet. App. 41, 49, and see Tr. 45-46). The court of appeals was simply availing itself of the opportunity to express its disapproval of another district court judge's ruling in another case.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied. In light of the pendency of *DuVernay* v. *United States*, No. 814, which may control one of the issues presented here, the Court may prefer to defer consideration of the present petition.

Respectfully submitted.

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